

# CONSTITUTIONAL LAW EXAM

## MODEL ANSWER

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SPRING, 1998

*[The following model answers were taken largely from students' responses to the exam questions. I have added and subtracted material as I deemed necessary.]*

1. The Equal Protection Clause of the 14th Amendment (EPC) prohibits government from denying any person equal protection of the laws. As developed by the Supreme Court, equal protection challenges to government action are analyzed on different levels, depending on the nature of the classification.

*[The background material in the next two paragraphs tends to be longer than is necessary, but I left it in.]*

Courts apply strict scrutiny to suspect classifications; this standard requires government to have designed its law so that it is necessary to achieve a compelling interest. "Necessary" means that there are no less discriminatory but equally effective alternatives. Courts also presume that suspect classifications are unconstitutional, and government has the burden of rebutting this presumption. When strict scrutiny is applied, the law is rarely upheld because the standards are so strict.

When government does not discriminate on the basis of a classification which is suspect by nature or by history (and when no fundamental constitutional right is affected), courts will uphold a law if it merely rationally related to a legitimate end. On this "bottom tier" of equal protection analysis, courts presume that the challenged law is constitutional, and great deference is given to the government's choice of the interest to be served and the means by which it is achieved. Social regulations and economic laws generally fall in this category so long as no suspect class or fundamental right is involved.

✂ The mid-level scrutiny test, which will likely be implicated here, is reserved for quasi-suspect classes, such as gender. To withstand an equal protection challenge, the NJ law at issue here must be designed to achieve an important objective; NJ contends that its end is the saving of tax money. In addition, the means (removing paid pregnancy sick leave from the benefits available to level 1 employees) must bear a substantial relation to that end. A presumption of unconstitutionality applies to such laws, but the strength of that presumption is not as great as it would be when strict scrutiny is applied.

In Boren, the Court struck down a state law which prohibited the sale of 3.2 beer to males under 21 while allowing females to purchase it beginning at age 18. The

West Virginia. Approximately 90% of West Virginia's coal is sold in interstate commerce. The mining companies which produce this coal do so on land leased from the land owners. Five major mining sites exist in the state; four are owned by private citizens and one is owned by the state. Three mining companies have leased these sites for the mining of coal. One of these mining companies is a West Virginia corporation, but the others were incorporated and have their headquarters in other states.

Recently, West Virginia passed the Coal Tonnage Tax Act of 1997 (the "Act"). This Act provides for payment to the mining companies of a sum calculated at the rate of \$.25 per ton of West Virginia coal which is sold in the state. These payments come from the general revenues of the state. A growing nationwide shortage of coal has gradually increased the price of coal on the interstate market. Higher prices prompted the West Virginia legislature to pass this law to assist local residents wishing to buy coal produced in the state.

A number of out-of-state companies and governmental entities which routinely purchase West Virginia coal have challenged the Act in federal court claiming that it is unconstitutional. They contend that the Act discriminates against interstate commerce in purpose and in effect. The challengers note that local residents have been given a competitive advantage over out-of-state purchasers. In this time of shortage, out-of-state purchasers can compete for the limited quantity of West Virginia coal only by paying higher prices. West Virginia has effectively given local purchasers a discounted price through the use of state tax money.

The state argues that the tax does not discriminate against the interstate sale of coal. Furthermore, West Virginia argues that the refunds are a subsidy and are, therefore, immune from a constitutional challenge. The state also argues that it can do what it wishes with the coal mined from the land it owns.

**MAKE THE BEST ARGUMENT TO SHOW  
THAT THE ACT IS CONSTITUTIONAL.**

**3. (20 points: 36 minutes)**

In 1997, Congress passed the Federal Products Liability Reform Act ("Act"). In this law, Congress limits the grant by any court, federal or state, of damages for a products liability claim (or for multiple claims arising from the same transaction).

The statute restricts the grant of pain and suffering damages to an amount equal to triple the medical expenses caused by the injury or \$250,000, whichever is the larger amount. The statute also restricts punitive damages to an amount equal to triple the actual damages (all damages other than for pain and suffering) or \$350,000, whichever is the larger amount.

Congress failed to include any findings which indicated the effect of such damage awards on interstate commerce, and no hearings were held to determine that effect. However, once suit had been brought to challenge the constitutionality of the Act, the lawyers for the United States contended that the uncertainty caused businesses by the allowance of unlimited punitive and pain and suffering damages hindered interstate commerce. Problems were caused interstate commerce because corporations hesitated to sell their products in states which had no limits on these damages. In addition, the U.S. argued, the price of goods moving in interstate commerce has been unnecessarily increased by the added cost of insurance. This insurance is required to protect businesses from the uncertainty generated from the possibility of huge awards based on punitive or pain and suffering damages.

**MAKE THE BEST LEGAL ARGUMENT SUPPORTING  
THE CONSTITUTIONALITY OF THE ACT.**

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**4. (15 points: 27 minutes)**

The State of Montana recently passed a law which requires single women of child-bearing age to have the birth control implant known as Norplant if they wish to obtain or continue to receive state funds through the Aid For Dependent Children ("AFDC") program. A state can reduce its participation in the program even though federal funds would still be available.

A group of single women have challenged this law as an infringement of their right to make private decisions about procreation. They are all of child-bearing age and are in need of AFDC funds to support their children but do not wish to submit to forced birth control in order to obtain the money.

[Even though no one has a constitutional right to welfare payment, the state cannot require one to surrender a constitutional right in order to obtain that support. In other words, assume that the law does infringe whatever right the court considers

to exist. The sole question is whether there is a right to be free from coerced birth control.]

The state defends its position by noting that it has limited funds to spend on the AFDC program, and this law seeks to protect its limited resources by discouraging women from having more children who must be supported. By preventing new births, more money will be available for those children who are in the program.

**DOES THE MONTANA LAW VIOLATE  
THESE WOMEN'S RIGHT OF PRIVACY?**

**Explain your answer.**

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**5. (15 points: 27 minutes)**

The State of Alaska owns more land than any other state. Much of this state-owned land is in the state's southern portion where the temperatures are more moderate, at least for Alaska. However, very few Alaskans have chosen to live outside the cities and town. To relieve the crush on limited municipal services and to populate the southern part of the state, Alaska passed a law providing for the sale of state-owned land in this area.

The law requires the state to establish the market value of salable land through an independent appraisal. It then requires the state to give any Alaskan domiciliary a one percent reduction in that market price for every year that person has been domiciled in Alaska. In other words, a 10-year resident would receive a 10% reduction in the purchase price, a 20-year resident would receive a 20% reduction, and so forth. ["Resident" and "domiciliary" are used interchangeably in this problem. Both refer to someone who has made Alaska his or her home.]

This Alaskan law has been challenged by a man who wishes to purchase some of this land but has been a domiciliary of the state only for two years. He complains that the prime areas will be purchased by long-term domiciliaries because they enjoy such a competitive advantage in paying for the property. He also complains that long-term domiciliaries receive much larger subsidies in this program than short-term domiciliaries. The state defends by arguing that it can assume that long-term residents have made a greater contribution to the state and

are, therefore, more deserving.

**MAKE THE BEST ARGUMENT TO SHOW THAT THIS  
LAW VIOLATES THE EQUAL PROTECTION CLAUSE.**

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**End**

**1. (25 points : 45 minutes)**

The State of New Jersey has established five categories for the classification of state employees. The categories are referred to as "levels" and run from Level 1 to Level 5 in descending order of importance. Level 1 employees receive the highest rate of pay, and this category includes all of the supervisory and managerial employees of the state. Level 5 employees are the lowest paid.

The State has established a law which allows all state employees, regardless of the level, a maximum of 25 days per year at full pay for sick leave. The law allows Level 2 through 5 employees to earn sick leave for illness, physical injury, or physical incapacity. Level 1 employees can obtain paid sick leave only for illness or physical incapacity. State courts have interpreted "physical injury" to include injuries resulting from participation in sports, but have consistently held that neither "illness" nor "physical injury" covers pregnancy. Pregnancy is covered as a "physical incapacity" for Level 2 through 5 employees, but Level 1 employees cannot obtain paid sick leave for physical incapacity. [Federal laws require employers, including the states, to allow pregnancy or maternity leave which protects a woman's job, but this required leave need not be with pay.]

Several women who are employed as Level 1 employees of the state have been denied paid sick leave for their pregnancies. They have now sued the state officials responsible for administering the law for back pay and damages. They contend that the New Jersey law is in violation of the Equal Protection Clause. Prior to 1984, all levels were allowed sick pay for pregnancy. In that year, the legislature recognized that as more women obtained these high-paying Level 1 jobs paid pregnancy leave would strain the state's limited funds. The change to the present law was made, in part, to save money. In addition, the preamble to the law includes the following statement: "By removing paid pregnancy sick leave from the benefits available to Level 1 employees, the state announces its recognition that such employees have to be dedicated primarily to their careers as professional supervisors and managers."

**MAKE THE BEST CONSTITUTIONAL  
ARGUMENT FOR THE CHALLENGERS.**

**2. (25 points: 45 minutes)**

Thirty-five percent of the coal produced in the United States is mined in

ST. MARY'S UNIVERSITY SCHOOL OF LAW

CONSTITUTIONAL LAW,  
SPRING 1998, Section B

FINAL EXAMINATION  
David Dittfurth

Instructions

1. This examination consists of six (6) pages, including this one. Before beginning, make certain that you possess a complete and legible copy. The examination consists of five (5) questions. You will have three (3) hours in which to complete the examination.
2. I have assigned a point value (percentage of 100 points) to each of the questions, and for each I have *suggested* a time allotment (percentage of 180 minutes). **AVOID SPENDING A DISPROPORTIONATE PERCENTAGE OF TIME ON ANY QUESTION.**
3. In taking the examination, you are **not** allowed to use books, notes, or any other aid (except writing or typing materials).
4. In taking the examination you **may**:
  - a. mark on this copy of the examination,
  - b. respond to the questions in any sequence,
  - c. use understandable abbreviations, or
  - d. leave space after an answer in contemplation of additions.
5. If any part of a problem is ambiguous, explain your confusion and use what you consider to be the most reasonable interpretation under the facts in responding to the question.
6. When you have completed the examination, place this copy inside your bluebook(s) (or attach it to your typed pages) and turn in both. Place your exam number on the front of your bluebooks or typed pages and in the space below. Also, write "CONSTITUTIONAL LAW" on the front of your first bluebook or on the first page of your typed answers.
7. By handing in the examination without comment, you are assumed to have sworn to the following:

I HAVE NEITHER GIVEN NOR RECEIVED UNAUTHORIZED AID IN TAKING  
THIS EXAMINATION, NOR HAVE I SEEN ANYONE ELSE DO SO.

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EXAM NUMBER

discrimination against 18-21 males was deemed unconstitutional even though the state contended that its purpose was to reduce driving while intoxicated. The state's discrimination against young males was allegedly based on a statistic showing 2% of males were arrested for driving while intoxicated, as opposed to a much smaller percentage of females. The Supreme Court held that these statistics did not establish a substantial relation to the objective of traffic safety. In essence, the Court could not escape the conclusion that the state punished young males because of a stereotypical view of young males as wild and unruly drinkers, in contrast to the stereotype it must have had of young "ladies." The Court was left with this conclusion because it could not believe that the state would believe that a law which prevented the purchase, but not the consumption, of a supposedly non-intoxicating beverage was needed because 2% of young males were arrested for DWI. If that were the state's concern, why did it allow young males to consume 3.2 beer legally. In reality, young males needed only to have an 18 year old girl friend who would buy it for them.

Analysis of the challenge to the NJ law yield results similar to those found in Boren. First, saving taxpayer money should be an important objective. However, allowing pregnancy sick pay for level 2-5 employees and not to level 1 seems to be a very inefficient way of saving tax money. If the state was trying to exclude "sick pay" from any physical incapacity which resulted from voluntarily activity, why didn't it deny sick pay for sports related injuries. Remember, the state was not firing people for these sorts of incapacities; it was only denying them pay for the days they needed to recuperate.

In addition, the state had nondiscriminatory alternatives, such as the reduction for all workers of the days for which they could receive sick pay. Why, one would ask, did the state choose to punish only women -- and only women who had "invaded" the upper level positions that had previously been taken exclusively by men.

In the VMI case, the Court held that gender differences did not provide a sufficient basis for retaining the all-male enrollment of a state college. Generalizations about the abilities, wishes, and roles of men and women didn't show that a prohibition against enrollment by women was substantially related to the end of providing the VMI form of boot-camp education. In the case of this NJ law, the state suggests that when a woman employed on level 1 becomes pregnant she proves by that voluntary act her lack of dedication to her career as a professional supervisor and manager. Again, why doesn't a level 1 male prove the same by playing basketball and twisting his knee?

In VMI, the state contended that the all-male college should be permitted to continue because to do so provided diversity in education. Furthermore, VMI claimed that allowing women in the program would materially change the specialized form of education it provided. This justification was rejected by the Court largely because the state's generalized notions about women failed to provide the "exceedingly persuasive" justification for a blatant discrimination against an historically victimized class.

One minor difficulty must be overcome by the challengers before they can obtain

mid-level scrutiny. The NJ law denies level 1 employees sick leave pay for pregnancy. In a strict sense, this law does not expressly distinguish on the basis of sex (I'm being overly cautious here). If one accepts that argument, the decision in Washington v. Davis would require the challengers to prove that NJ intentionally discriminated against women. The effects fall solely on women in level 1, and this satisfies the first requirement of Davis.

One should note at this point that the discrimination occurs between men and women employed on level 1. The challengers would be relegated to the rational relationship analysis if they only proved discrimination between women at different levels; they must show discrimination against women and in favor of men.

The state rather clearly announced its intent to discriminate against women in level 1 civil service jobs by stating that pregnancy at that level proved the employee was not serious about her career. Pregnancy can only occur in women. Therefore, the effect on women (but not on men) had to be known by the state before it enacted this law. Furthermore, the no-dedication justification operates only against women. A logical leap is not required to conclude that the state knew it was affecting only women and that it intended to do just that. At the very least, the evidence available shows that a motive was to discriminate against women.

Men who suffer injury while engaging in sports are not labeled as not-dedicated, and they retain the sick pay benefit. As noted, both pregnancy and sports injuries would, ordinarily, be disabilities caused by voluntary activity. If so, why does the state deny benefits only to women? This discrepancy shows that this law would not, indeed could not, have been enacted had no discriminatory purpose existed. In fact, the state indulges the stereotype which suggests that women cannot be relied on in responsible positions because they will decide to have children and stay home. This generalization fails to provide an exceedingly persuasive justification for the discrimination. In reality, the reason for the discrimination arises solely from the stereotypical view of women and of their "proper" role -- as mothers and homemakers.

A court should be skeptical about the state's claim that by taking pregnancy benefits away from level 1 employees it will save tax money. No evidence shows that just because women may be obtaining more of these high paying jobs they will become pregnant in large numbers and strain the state's limited funds. The total number of women in levels 2-5 may be more than all these women pregnant in level 1, thereby allowing very little savings. Furthermore, if the state is serious about saving money, why does it not deny sick leave benefits to all voluntarily caused disabilities.

In summary, the state has failed to show an exceedingly persuasive justification for its discrimination against women in level 1 jobs. Indeed, its only reason seems to be one which is wholly illegitimate -- preventing women from enjoying both a family and a career. No level 1 man is seen as undedicated to his career when he produces children.

2. The Commerce Clause grants Congress the power to regulate commerce among the states. The mere existence of the Commerce Clause has been construed to restrict the states from enacting legislation that discriminates against or unduly burdens interstate commerce (IC). This restriction is referred to as the negative effect the “dormant” Commerce Clause (DCC).

If the state's subsidy is seen as discriminatory -- because it offers money to coal producers only when they sell that coal in the state -- it must be analyzed under the compelling test. However, West Virginia has a compelling interest in assisting its residents to buy coal during a time of shortage. The question becomes how “necessary” is the means used to achieve that interest. This case is unlike Carbon, because in that case the city was attempting to hoard all the trash produced in that particular town for a local processor. In doing so, it was seeking to finance its subsequent purchase of the processing plant and to provide the current private owner with a sufficient profit. It was accomplishing these ends at the expense of competing processing plants both in the state and outside the state. However, in this case, out-of-state purchasers of WVA coal are not prevented from competing for that coal. Their access is not hindered by the state; they can compete with the subsidized WVA purchasers by paying more.

In Carbon, the govt. was attempting to pay for the waste station by insuring the private owner a sufficient profit until its purchase; this profit -- at the expense of out-of-state competitors -- was really part of the city's purchase price. In effect, the city was providing a local business (and itself) a significant benefit at the expense of out-of-state, as well as in-state, competitors. The city could have accomplished the same result by using its citizens' tax money to purchase the local processing plant. If the city had done so, it would have reaped the same benefit but would have done so without exporting the costs. Under that alternative, the city would have borne all of the costs for the benefit it reaped, and, as the Court indicated, would have survived the constitutional challenge.

West Virginia has done just that by giving local purchasers a discounted price through the use of state tax money -- tax money which comes from the general revenues of the state not from a discriminatory tax. In essence, WVA. has used the least discriminatory means to achieve its compelling interest. Therefore, if it was discriminating, it has done so in a way which places the least burden on interstate commerce. If the Court were to prohibit this sort of discrimination, it would prevent the state from protecting its own citizens because no less discriminatory, and therefore constitutional, means exists.

By erroneously arguing that it can do what it wishes with the coal mined from the land it owns, West Virginia is invoking the market participant (MP) exception to the DCC. West Virginia is acting as a participant and not as a regulator, but it is doing so only in respect to the market defined by the local purchase of WVA coal. The DCC does not apply to its discrimination in the use of its tax money (only to benefit local purchasers) because West Virginia is not attempting to regulate any downstream activity.

For instance, it does not regulate what the coal producers have to do with their coal. West Virginia, as a market participant, has the power to buy and sell without constraint, and it is doing just that when it uses a tax subsidy to induce (not coerce) producers to sell local coal locally. As an MP, West Virginia can discriminate against out-of-state competitors.

West Virginia owns the mining sites/the land, just as did Alaska own the timber in Wunnicke. In Wunnicke, the Court held that Alaska was not a market participant because it attempted to participate in a market of which it was not a part; that what it did in effect was to stop IC at its borders. That is not the case here. The state's MP status comes from the subsidy transactions not from its ownership of one of the mining sites. The state could not use that ownership to establish MP status because its subsidy affects the coal produced at mines owned by other parties and because it would be engaged in downstream regulation if it sought to regulate the coal it had already "sold" to coal producers.

Here, however, West Virginia is financing the payments from general revenues and is using state tax money to "buy" coal for its residents. West Virginia is merely choosing who it wants to contract with in the coal business -- that is, it deals only with producers who sell WVA coal locally. There is no regulation after the execution of the contract. If the producers choose not to partake in the transaction, they are free to sell their coal outside the state. If they are induced to sell locally, their contract with the state is consummated.

A competitor might argue that because coal is a natural resource it can't be replicated at will and also that no investment or labor goes into the processing of it, unlike the case in Reeves where the state invested in a plant to make cement. However, the state has not hoarded its coal, and other states can compete effectively against this subsidy by providing a subsidy of their own. In effect, other states can replicate the inducement provided by WVA, unlike the Wunnicke case where other states could not compete with Alaska for their timber processing companies. This subsidy does not, therefore, place other states at the mercy of a state in which a natural resource is produced.

The Act also is not protectionist in nature. It also will not lead to the economic balkanization of the states. It won't awaken "State jealousies" or cause dangerous retaliatory measures. Other states are free to protect their own residents in the same West Virginia seeks to protect its residents, and some may choose to do so. However, because West Virginia's subsidy plan places the financial burden of the subsidy on its own citizens and voters, other states might think twice about doing the same. The political check on the proliferation of such laws arises because each state would place the burdens (as well as the benefits) wholly on local voters who may not wish their money used in this manner. If the burdens were exported to out-of-state interests, however, the voters would have no incentive to rein in their elected officials even if the subsidy was a bad

idea. Even if every state enacted the same sort of subsidy to protect its residents, the national economy would not be damaged.

3. The power to regulate commerce is of paramount importance because it is through this power that most of Congress's most important legislation was enacted. The interpretation of that power was expanded in Gibbons to all commercial intercourse, and not just to the buying and selling of goods.

Throughout most of the history of our Constitution, however, Congress has encountered problems in satisfying the Court that its actions were within the commerce power. It had less difficulty regulating the channels and instrumentalities of interstate commerce (IC) because these appeared more readily authorized by the Commerce Clause. However, when Congress began to enact business regulations of activities that appeared intrastate in nature, it was faced with many constitutional challenges. The Court used various tests, including the impact/directness test and the stream-of-commerce metaphor to distinguish the constitutional from the unconstitutional exercises of the commerce power.

Beginning with Jones and Laughlin, the Court began to expand the commerce power to allow Congress greater authority over intrastate activity. In J&L, the Court upheld the FLSA, noting that although the manufacture of steel was an intrastate activity, stoppage of steel production would have a substantial economic effect on IC. In Wickard (the wheat case), a federal quota was upheld against a challenge that, as applied to only one person, it could not be seen as regulating local activities which had a substantial effect on IC. There, the challenger produced more than his quota of wheat, but contended that the excess was produced for on-the-farm and home consumption. The Court found that, although a single farmer's overproduction may not affect IC substantially, allowing that farmer to overproduce would encourage all other wheat farmers to do the same. The overproduction of thousands of wheat farmers would, in the aggregate, have a substantial effect on IC.

The precise connection between the federal quota on wheat and interstate commerce was recognized by the Court through the application of simple and respected rules of economics. Congress's purpose was to raise and maintain the interstate price of wheat in order to allow wheat farmers a reasonable profit. In order to regulate that price, Congress could either reduce supply or increase demand. As a practical matter, it could best attain its goal by reducing the supply of wheat, and, assuming demand remained stable, the price would rise. It sought to control supply by imposing a quota to limit each farmer's production. However, if farmers could exceed their quotas by claiming that the excess was for home consumption, they would frustrate Congress's efforts in two ways. First, by creating an excess to cover all of their own needs, farmers would remove themselves from the market as possible purchasers of wheat. In reality, allowing the growing of wheat in excess of their quotas would mean that farmers would not need any

of the wheat they grew within their quota for personal needs. Hence, they could sell all of the wheat grown under their quota. This would increase the supply of wheat while reducing what would otherwise be a higher demand. Second, if thousands of farmers were free to grow as much wheat as they wished by labeling the excess as home-consumption wheat, that excess was likely to flood the market whenever the interstate price rose so high as to be a temptation. As the Court put it, the excess would "overhang" the market and tend to flow into interstate commerce just as Congress was about to achieve its goal of raising the price of wheat.

The Court began to limit the Commerce power in Lopez, and it did so by requiring that a federal regulation of intrastate activity must deal with an activity which was commercial in nature. The local activity regulated in this case by the federal law is the use by state courts of state laws allowing unlimited damages in product liability cases. Damage suits of this sort have a rather direct connection with the commercial activity represented by the interstate sale of products. If product liability suits are not commercial in the purest sense of the adjective, they do have an obvious and immediate connection to commerce. One could say that, unlike the Gun-Free School Zone Act deemed unconstitutional in Lopez, this federal law seems to have a far more direct effect on the interstate sale of products -- a market endangered by the risk of unlimited tort damages. In Lopez no simple and authoritative principles or rules proved the connection between the local activity (gun possession) and the alleged burden on IC. In this case, one does not need to cobble together a series of questionable inferences. The connection is obvious.

Also, the insurance costs needed to protect businesses from the uncertainty of limited damages will substantially affect IC. Product liability lawsuits naturally involve and affect the buying and selling of products. These are commercial exchanges, but in Lopez the possession of guns alone was regulated, regardless of whether those guns had moved in IC or whether their possession had any direct effect on IC.

Because of the close connection to commercial activity, the Court will in this case find that limits on product liability damages would have a real and substantial effect on IC. And, as in Wickard, the aggregate of unlimited liability cases can be seen to have a substantial economic effect on IC. The U. S. argues already that the price of goods moving in IC has been increased by the added costs of insurance. If any state were allowed to enforce unlimited liability laws, business costs will increase because of the increased need for liability insurance and because of the ever growing cost of that insurance. These additional costs would, of course, be passed on to the consumers of those products, or those costs may deter companies from creating new products or from using IC for the sale of those products.

Additionally, we are not dealing here with matters traditionally reserved to the states, such as the police power over health, safety, or morals. As such, giving Congress the power to regulate product liability claims will not usurp state sovereignty.

Congress also is not “commandeering” the legislative bodies of states in order to force them to regulate as the federal government desires. (New York) Congress also is not taking control of state executive or administrative officials in a way which confuses accountability (Printz) Even though Congress will regulate what state courts do, that has never been a problem under the recent cases interpreting the limits of the Tenth Amendment. Indeed, the Supremacy Clause expressly recognizes that federal law must control the actions of state judges.

4. The right to privacy is not a right which is expressly protected in the Constitution. However, the Court in Griswold held that a constitutionally protected zone of privacy encompasses the rights to marry, to bear children, and (of a married couple) to purchase and use contraceptives. Montana (M) is violating these women’s right to privacy by requiring single women of child bearing age to get Norplant in order to receive AFDC benefits. If M is violating a fundamental constitutional right, it must use the least intrusive means for achieving a compelling interest.

By requiring Norplant, M intrudes on a woman's right to make essentially private decisions about having or not having children. These women should be able to make decisions concerning intimate matters without government coercion. And although the state's interest in protecting limited resources is compelling, less discriminatory alternatives exist, such as sending women to birth control classes or providing free access to other birth control medicines. Once Norplant has been surgically implanted, a woman loses her control over her reproductive system; in effect, the state has taken control of that part of a woman's life. She cannot choose not to use birth control because she can't remove Norplant when she wishes. The state has used the most intrusive means so that a woman cannot easily regain control over her own reproductive decisions.

The right to privacy is fundamental in the sense that it is implicit in the concept of ordered liberty and is rooted in our society's tradition and collective conscience. In Bowers, the Court held that homosexual sodomy was not a fundamental right because sodomy had not been tolerated or protected in our history. In fact, just the opposite was true; almost every state had long prohibited homosexual sodomy, often through its criminal law. Therefore, the Court reasoned in Bower, the right to homosexual sodomy could not be found in our traditions and therefore could not be discovered as a constitutional right. However, when compared to homosexual sodomy, allowing women to decide whether to bear children is less repugnant to our sense of tradition. Since the majority in Bowers defined the purported right very narrowly, it might ask here whether a single woman's right to have children (or to make such decisions) has been protected in our society. Asked in this way, one might answer that such a right has not traditionally been protected. Our society has generally evidenced a hostility to unwed mothers, though less toward unwed fathers. Thus, establishing the right as a new one through the Bowers analysis may encounter this barrier.

As a counter to Bowers, we would stress the Court's seeming turnaround in Romer. In that case, the Court held that animus toward a class is not enough to sustain a law even under rational relationship, equal protection analysis. Some people may believe that unwed motherhood is immoral, and they may wish to prevent unwed mothers from receiving AFDC benefits, but Romer seems to hold that moral judgments alone are not sufficient to justify discrimination, even when not visited on a suspect or quasi-suspect class. That rejection of morality undermines Bowers, which accepted society's moral judgments as sufficient under the rational basis test.

The Court in Casey recognized the right to have or not to have a child is a personal one to the woman. As such, this right is fundamental and should be protected. Like Casey, these women should be free to make such intimate decisions free of the coercion of the state. The Court also has recognized the right to procreate in the Skinner decision. There, the Court held that the state could not impose involuntary sterilization against men thrice convicted of a particular class of crimes. However, the Court spoke of the right to marry and procreate. Another case that supports these women's right to enjoy AFDC benefits without suffering from coercive birth control is Cruzan. Although the Court assumed, but did not decide, that a person had a constitutional right to refuse medical treatment, such a right becomes important in this case. The state will contend that it can give its money to whomever it wishes (or not to whomever it wishes). However, if the state has used its financial power to infringe a fundamental constitutional right, the fact that the state is, in addition, seeking to control tax money will not save the law.

If the Court were to impose strict scrutiny on this state's law, it would surely fail because less intrusive alternatives exist to accomplish the money-saving goals of the state. For example, the state could set a maximum that it will contribute for aid to children; once a mother reaches that maximum, no extra compensation would be earned for new children. This approach gives the state absolute control over its finances without intruding on a woman's intimate choices.

5. This case presents a problem under the Equal Protection Clause, either because of an invidious classification (against new residents and in favor of long-term ones) or because of discrimination in regard to a fundamental right.

The right to migrate is fundamental because it must exist in order for ours to be a free society and as a further way of binding the individual states together. The right has been located in the Commerce Clause, in other specific provisions, and in the structure of the Constitution. The important point to understand is that the Court has recognized it as a fundamental constitutional right whether it is explicitly or implicitly protected by the Constitution itself.

If the state's preference for long-term residents infringes this right, Alaska can sustain its law only by showing that it has a compelling interest and that there are no less

discriminatory alternatives available. Equal protection analysis might also show that the discrimination between new and long-term residents is so irrational that it would not survive rational basis "with a bite" review.

This case is similar to the durational requirement in the case (Shapiro) involving receipt of welfare benefits. In that case, the right to travel across state lines was burdened by a law which prevented anyone from obtaining welfare benefits until they had been a resident for a year. The Court held that law unconstitutional even though indigent persons were allowed to travel or to establish new homes in whichever state they might choose. The state in Shapiro did not directly prevent migration as did the state of California in the Edwards case. In that decision, the Court held unconstitutional a California law which imposed criminal penalties on anyone who brought an indigent person into the state. However, the state durational requirement did penalize the exercise of the right to migrate. In effect, the state in the Shapiro case exacted a toll on indigent persons because they were the ones who might be deterred by an inability to obtain life-sustaining welfare benefits for an entire year. It was also clear that the state did not need a durational requirement to determine whether a person was really a domiciliary of the state.

In this case, the state of Alaska has imposed a penalty on those who did not move to that state much earlier. Even though short-term residents still receive some discount in regard to the purchase of state lands, the grant of such a significantly larger discount to long-term residents may mean that those who have moved to the state recently will truly be denied the ability to purchase what may be valuable state lands. By weighting the competition for state lands against short-term residents, the state may be denying them the ability to buy state land. That denial does not prevent anyone from migrating to Alaska, but it does impose a penalty which could deter those who would otherwise wish to move there. The deterrence may flow from the recognition that the state seemingly operates for the benefit of the old-timers.

If the Alaska law does infringe the right to migrate, the state will be forced to satisfy the compelling interest test. As indicated below, Alaska cannot satisfy that test. Even if the state has not penalized the right to migrate, the discrimination among residents based on the length of their residence does not survive rational relationship review. Here, the mere rationality test applies because the law is economic in nature, and no quasi-suspect or suspect classification appears on the face of the law. Therefore, a presumption of constitutionality is given and the court must defer generally to the judgments of govt.

However, in Cleburne a city ordinance (or its application) was struck down because the Court believed that citizen bias, ignorance, or dislike was the primary motive for discrimination against a non-suspect class (the mentally retarded). Here, Alaska's prejudice toward those who have not lived in Alaska as long is insufficient. Thus, even under a mere rationality test (especially one "with bite"), this law could not survive.

LOOK



① Note: In the question, you say: "Level 1 employees can obtain sick leave only for illness or physical incapacity." Later, you say: "... but ~~the~~ Level 1 employees ~~can~~ cannot obtain paid sick leave for physical incapacity." These two statements are inconsistent, so I am taking the ~~the~~ first use of "incapacity" to mean "injury" correct based on the context of the question <sup>(see exam)</sup> and the facts of the Geduldig case. Please read the answer with this in mind. Thanks. →

EQ = equal protection OR equal prot. <sup>clause</sup> clause  
DP = Due process or due process clause

(1), cont'd.

We ~~have~~ have before us an EQ problem. The challengers will say that, while they are similarly situated to others, the law treats them differently b/c they are women. The challengers will ~~not~~ attack the law as a sex-based classification because: a) it particularly attacks them (pregnancy is a characteristic that can be had only by women), and b) The SCT has identified gender as a quasi-suspect class (thus meriting heightened scrutiny on the middle tier of EQ analysis and

enhancing their chances of victory.)

With heightened scrutiny in place, the law is generally presumed to be unconstitutional, and the state must show that the law is substantially related to the ~~the~~ end hoping to be achieved.

Although the burden of proof of constitutionality now falls on the state, the challengers will not want to stop there; they should also attempt to show that the law violates the EQ using governing

precedent. Using the test in Wash. v. Davis, the challengers would try to show that the law was enacted to discriminate against women. First,

This would establish a prima facie case!

the test requires us ~~to~~ to look for ~~discriminatory~~ discriminatory language on the face of the statute. It is unlikely that such a statement ("we are discriminating against women") exists, so we proceed to the next step.

The next step provides that we look for a disparate impact resulting from the law. Here, the challengers

would say that the disparate impact is their loss of benefits if they become incapacitated by pregnancy (an impact felt by no one else in the system).

This impact is likely to be accepted by the Court b/c of its apparent truth. ~~§~~ If this step is completed and satisfied, we would go to the next step, a finding of intent.

Here, we must determine whether the state enacted the law "because of" this effect or ~~in~~ "in spite of" this effect. In answering that

in a time of ~~the~~ shortage. The State would say that they are only contracting with the in-state buyers and not imposing a burden on out-of-state buyers through their activities. The State would also say that their rights as a sovereign allow them to <sup>SHOULD READ "SUBSIDIZE"</sup> subsidize their industries to encourage growth, and b) dispose of their treasury at their own discretion.

However, the challengers would point to an exception in the Winnicke case that says that, since natural

Because of potential Balkanization of natural resources.

are involved, the MPD doesn't apply.

The state would respond by distinguishing

Wunnicke from the case at hand b/c

of the contract issues involved (the

nature of this "K" is not as burdensome

on out-of-state interests as the K

in Wunnicke). Also, the state would

again point to Reever, where a

shortage much like this one was involved.

Unlike Wunnicke, this subsidy doesn't prohibit export; it only induces sale to local residents. In addition all of the costs are borne by W.Va.; there aren't reported.

ICC = ~~Inter~~ Interstate Commerce Clause

③ Before ~~us~~ us is a problem involving the ICC power of Congress. Governing this area are four cases: Wickard, Jones + Laughlin, Darby, and Lopez. Under these cases, the ~~the~~ US has a good shot at winning.

First, in response to an argument questioning the motive of Congress for this law (eg. that Congress didn't pass this law to regulate IC), the US would say that motive is unimportant, as established in the Darby case.

In Darby, the purpose of the law was

obviously to ~~say~~ install a ~~no~~ minimum wage requirement nation-wide. The Court said this was OK, b/c the power to regulate IC is w/o reservation or exception, and therefore Congress may prescribe the manner in which it is implemented. Likewise, the US would contend<sup>here</sup>; motive is irrelevant b/c Congress has plenary power to regulate this area.

The problem for the US under the law is whether or not the activity

regulated substantially affects IC.

The State would likely point to the

Wickard case to get around this

problem. In Wickard, even something

as remote as the home-use of wheat

was shown ~~to~~ to have a potential effect

on IC. In this case, the US

could argue that high damages are

keeping people from entering into IC,

and, because of the "potential affect"

doctrine found in Wickard, they

don't have to wait around for the

effects to <sup>ac</sup>accumulate before they

nip them in the bud.

The only limit on this power (and perhaps the best salvation of the challengers) is the Lopez case.

Lopez seems to require a more ~~thorough~~

thorough examination of Congress'

~~activity~~ activity. The challengers

could conceivably argue that what

ALA  
GUN-FREE  
SCHOOL  
ZONES ↓  
Congress is regulating is not sufficiently  
commercial to be subject to the ICC.

The US would likely respond that,

since this involves the flow of

money from state-to-state, the

activity is sufficiently commercial  
to ~~and~~ satisfy the limits of Loez.

Finally, another argument for the  
US is found in Article III is the  
Supremacy Clause. There, it is stated  
that State Court judges are bound to  
enforce federal law. This would be  
mainly a "bolstering" argument.

This is a substantive DP problem, by the way.

④

The answer to this question is not "yes" or "no." The better answer ~~is~~ is: It depends on how you read the implied fundamental rights created in Skinner, Griswold, and Roe. One way to read them is: Taken together, these rights give a person total control

Possible interpretations under this reading !!!

over matters of procreation (a) Skinner giving the right to procreate at all, (b) Griswold giving the right, through the privacy right, to limit your procreation, and (c) Roe giving the right to terminate what you have already "procreated".

Another ~~way~~ way to approach the

rules in those cases is: The rules in those cases established those ~~equal~~ rights only, and under the modern approach is Cruzan, <sup>and Bowers</sup> no new rights may be created under the given guise of the DP in the 14th Amendment.

If one were to take the former approach, the answer to the question would likely be "yes." This is because, if matters of procreation are fundamental rights, state regulation of them must be subject to strict scrutiny. Under

strict scrutiny, the regulation must serve a ~~compelling~~ compelling state interest and be implemented by the least <sup>DISCRIMINATORY</sup> discriminatory means. The State rarely wins cases ~~lets~~ that have been subjected to strict scrutiny.

However, if you take the latter approach (reading the right in Skinner, Griswold, and Roe narrowly), the answer is most likely "no." Apply that rationale. Using the rationale from Bowers and Cruzan, a court would

probably say that the DP can no longer be used to create new rights. ~~Instead~~ Instead, a challenge must be brought under EQ, and, unless the right can be linked to an explicit right in the Bill of Rights or a previously-created

BY THE COURT,  
eg. right of association  
in NAACP v Alabama ex rel Patterson

right, then the regulation will be ~~placed~~ placed on the lowest tier of EQ analysis. There, the regulation must only have a rational relationship to the ~~and~~ end desired. In such

cases, the state rarely loses.

All that aside, the answer also might depend on whether a Brennan or a Scalia is on the bench, don't you think?

See abbreviations in first book.

LOOK!

↓  
⑤

This is a problem of EQ involving durational requirements for the dispensation of "benefits." (subsidies, actually)

The challenger's best argument would likely come from the Zobel case, which we briefly discussed in class.

In Zobel, Alaska gave greater subsidies to those who had lived in AK longer ~~the~~ than other residents. There, the

Court said that the <sup>subsidies</sup> "must not be conditional on duration b/c it treats certain people "within [its] jurisdiction" more favorably than others. The

and who the K is designed to affect  
contracting with. If the K is designed  
to affect third parties out-of-state,  
then the MPD doesn't apply and we use  
ordinary DCC analysis. If the K is  
with people or businesses with whom  
the state is doing business (with  
in priority?  
proprietary rather ~~that~~ than governmental  
interests in mind), then the state is  
an MP and the MPD applies.

Here, the state will try to use  
the rationale in Reeves v. Stake,  
where a state subsidized the sale  
of concrete to in-state ~~buyers~~ buyers

Court noted that durational requirements do not generally withstand EQ analysis.

Also, the challenger could use the Shapiro case as an applicable precedent. Although, in our facts, ~~the~~ right to travel is not implicated, Explain.

the rationale employed by the Court concerning durational requirements is highly useful to the challenger.

In Shapiro, the Court said that the EQ was violated if a state conditioned its benefits on how long someone had been domiciled w/in its jurisdiction.

Because Zobel is so nearly on point,  
and because Shapiro ~~has~~ has also  
forbidden durational requirements such  
as these, I ~~do~~ believe this to be the  
challenger's best argument.

You told me what the arguments  
would be without giving those  
arguments.

that they were not discriminating against women, but that they were regulating the effects of pregnancy on the treasury. One might think this rationale is absurd given that only women can get pregnant, but such an argument might fly (as seen in ~~Gold~~ Geduldig).

The state's arg. would be founded on its need to conserve its limited resources. A question to ask here would be: Why do sports injuries qualify?

IC = interstate  
commerce

DCC = ~~Foreign~~ Domestic Commerce Clause  
MPD = Market Participant Doctrine  
MP = Mkt. participant

② The state should attempt to show that traditional DCC analysis does not apply to the case at hand b/c of the MPD. It will also try to show that none of the exceptions to the MPD apply.

First, we know that IC is affected b/c out-of-state buyers must pay more for the coal than in-state buyers. However, we must ask if the state's involvement ~~is~~ is to affect IC or if they are merely a MP. This question largely hinges upon who ~~is~~ the state is